01 557 AUG 06 2001
OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

DONALD STEPHEN ERMERT,)
)
Petitioner,)
)
v.)
)
ROBERT L. AYERS, Warden,)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL J. McCABE
Attorney for Petitioner
California Bar No. 54078
2442 Fourth Avenue
San Diego, CA 92101-1609
(619) 231-1181

Attorney for Petitioner
DONALD STEPHEN ERMERT

67pp

QUESTIONS PRESENTED FOR REVIEW

A. **Whether a certificate of appealability should issue to permit appellate review of petitioner's claim that the introduction of propensity evidence admitted at petitioner's trial was dissimilar and irrelevant as to consent, the only contested issue, thereby depriving petitioner a fundamentally fair trial guaranteed by due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.**

B. **Whether a certificate of appealability should issue to permit appellate review of petitioner's claim that introduction of petitioner's assault with a deadly weapon conviction, which was non-sexual on its face, was improper, thereby depriving**

petitioner of a fundamentally fair trial as protected by the Fifth and Fourteenth Amendments to the United States Constitution.

C. Whether a certificate of appealability should issue to permit appellate review of petitioner's claim that the evidence adduced at petitioner's trial was insufficient as a matter of law to sustain his convictions.

TABLE OF CONTENTS

Questions Presented for Review i

Table of Contents iii

Table of Authorities v

Opinions Below 2

Jurisdiction 2

Constitutional and Statutory Provisions Involved vi

Statement of the Case 3

Reasons for Granting the Writ 10

1. **The introduction of petitioner's uncharged prior sexual acts was improper because they lacked sufficient similarity to be probative. This Court should remand this case to the United States Court of Appeals for the Ninth Circuit for the issuance of a certificate of appealability because reasonable jurists can debate (1) whether the prior sexual acts were similar in this case, and (2) what factors courts should look to when determining similarities.** 10

2. **The introduction of petitioner's assault with a deadly weapon conviction was improper because the conviction did not involve sexual conduct. This Court should remand this case to the United States Court of Appeals for the Ninth Circuit for the**

issuance of a certificate of appealability because reasonable jurists can debate whether (1) the introduction of a non-sexual conviction was proper in this case, (2) the assault upon Ms. Hughes was similar enough to be constitutionally admissible. 14

3. The evidence adduced at petitioner's trial was insufficient as a matter of law to sustain his convictions. For this additional reason, this Court should remand this case to the United States Court of Appeals for the Ninth Circuit for the issuance of a certificate of appealability. 17

CONCLUSION 21

DECLARATION OF SERVICE

APPENDIX A

APPENDIX B

TABLES OF AUTHORITIES

United States Supreme Court

Estelle v. McGuire,
502 U.S. 62 (1991) 19

Hohn v. United States,
524 U.S. 236 (1998). 2

Jackson v. Virginia,
443 U.S. 307, 319 (1979). 15

Slack v. McDaniel,
529 U.S. ___, 120 S.Ct., 1595 (2000). 10

Circuit Courts

Doe v. Rudy-Glanzer, 232 F.3d 1258,
1268-1269 (9th Cir., 2000). 11

United States v. Delmerle,
99 F.3d 80, 85 (2nd Cir., 1999). 12

United States. v. Meacham,
115 F.3d 1488, 1494 (10th Cir.,1997). 11

United States v. Gabe,
237 F3d 954, 959 (8th Cir., 2001). 11

United States v. McHorse,
179 F.3d 889 (10th Cir. 1999). 19

District Courts

United States v. Guardia, 955 F.Supp 115 (D.N.M.) 20

State Courts

Commonwealth v. English,
993 S.W. 2d 941, 945 (Ky., 1999) 11

DeVonish v. State,
500 S.W. 2d 800,801 (Tex. Crim. App. 1973).....11

Dupree v. State,
543 So. 2d 125, 128 (Fla.
App. 1 District 1994).. 14

People v. Falsetta, 21 Cal. 4th 903, 911 (1999) 12

People v. James, 81 Cal. App. 4th 1343 (2000) 20

State v. Halstein, 857 P.2d 270 (Wash., 1993). 16

State v. Hammer, 613 N.W. 2d 629,
634-635 (Wis. 2000). 12

State v. Howell, 557 N.W. 2d 908, 912
(Iowa At. App. 1996). 10

State v. Patterson, 963 P.2d 436 (Kan. App. 1998). 17

State v. Jackson, 689 P. 2d 76 (Wash., 1984) 15

United State Constitution

United States Constitution, Amendment V. 4

United States Constitution, Amendment XIV. 2

Statutes and Rules

28 U.S.C. § 1251(1).. 2

28 U.S.C. § 2253(c) 3,6

California Penal Code §§ 236, 237 4

California Penal Code § 288(a). 4

RCW 13.40.135. 16

K.S.A. 22-4902(b)(12). 16

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

DONALD STEPHEN ERMERT,	)
	)
Petitioner,	)
	)
v.	)
	)
ROBERT L. AYERS, Warden,	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The petitioner, Donald Stephen Ermert, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit directing that Court to issue a certificate of appealability and to entertain petitioner's appeal on the merits.

Opinions Below

The order of the United States Court of Appeals for the Ninth Circuit denying petitioner's request for a certificate of appealability is attached as Appendix A. The memorandum decision and order of the United States District Court denying the petition for writ of habeas corpus is attached as Appendix B.

Jurisdiction

The United States Court of Appeals for the Ninth Circuit issued the order denying the petitioner's request for a certificate of appealability on May 7, 2001. This Court has jurisdiction under 28 U.S.C. § 1251(1) to review denials of certificates of appealability. Hohn v. United States, 524 U.S.

236, (1998).

Constitutional and Statutory Provision Involved

United States Constitution, Amendment V: "[N]or be deprived of life, liberty, or property, without due process of law."

United States Constitution, Amendment XIV: Same.

28 U.S.C. §1251: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case . . . ."

28 U.S.C. § 2253(c): "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right."

Statement of the Case

a. Facts surrounding the charged offenses

On February 14, 1996, a San Diego County jury

convicted petitioner of violation of the personal liberty of another by violence, menace, fraud, and deceit in violation of California Penal Code §§ 236, 237 (Count 1), and oral copulation against the will of another by force, violence, duress, menace, and threat of immediate and unlawful bodily injury in violation of California Penal Code § 288a (Count 2). Petitioner was sentenced to 21 years in custody on March 13, 1996.

Petitioner and Jackie Holman, the victim of the alleged conduct, had been acquainted for five years at the time of the incident in question. [R.T.[1] 45-47] Ms. Holman, a prostitute and a daily user of cocaine and heroin [R.T. 46, 88], had previously charged Mr. Ermert for sex. But, as they became good friends [R.T. 49], she no longer charged petitioner, and frequently initiated sexual relations with him. [R.T. 49, 92-93]

---

[1] "R.T." Refers to the Reporter's Transcript of petitioner's trial in the San Diego County Superior Court.

On or about October 10 or 11, 1995, Ms. Holman, whose lengthy criminal record includes felony convictions for armed robbery and possession of cocaine [R.T.46], recently having been released from custody, and under the influence of drugs [R.T. 87-91], called Mr. Ermert under the assumption that they would have sex that night. [R.T. 50-52]

Mr. Ermert picked up Ms. Holman in his van and took her back to the apartment he shared with his roommate, Paul Masterson. [R.T. 50-52, 205-208]. Mr. Masterson was home during all relevant times [R.T. 205-208], and the couple proceeded into Mr. Ermert's bedroom where they undressed. [R.T. 52-53]

Mr. Ermert and Ms. Holman had engaged in domination and bondage during previous sexual encounters, [R.T. 55, 89, 97, 223-224] involving her being tied up, handcuffed, clothes pins being put on her breast, and spanking. Id.

During the present encounter, Ms. Holman got onto

the bed and let Mr. Ermert handcuff her and tie her up. [R.T. 52-55] Mr. Ermert struck her in the stomach with a strap at some point, whereupon Ms. Holman asked him to stop. [R.T. 61-62]. He complied, but later hit Ms. Holman again.

As previously, Mr. Ermert gagged Ms. Holman and placed clothes pins on her breast and vaginal area. [R.T. 66-67]. However, on this occasion Ms. Holman became tearful and "pissed off" because of the pain. [R.T. 70, 89] She was also angry and somewhat fearful because she felt like she lost control of the situation [R.T. 59-60, 110], which feeling was intensified by her recent use of narcotics after being clean for a period of time. [R.T. 109]. However, she did not think Mr. Ermert was going to hurt her. [R.T. 59-60, 110].

After she was tied up for about 30 to 45 minutes [R.T. 70], petitioner released Ms. Holman and asked her for oral sex, which she performed. [R.T. 70-71, 92-93] During all this time, Mr. Masterson was present and did not hear anything such as crying or yelling, which he believed he would have

been able to hear. [R.T. 205-208]

However, upon returning home Ms. Holman was compelled to explain the marks on her body to her boyfriend. Ms. Holman knew he would be upset if the sex was consensual [R.T. 93-94, 200] so she told him that Mr. Ermert had forced her into it and that she didn't resist in order to protect herself. [R.T. 113].

"Pushed into it" by her boyfriend, Ms. Holman contacted police on October 13, 1995. [R.T. 73-74]. While Ms. Holman told Det. Bristol petitioner pulled a knife on her, [R.T. 139-173] she admitted during her trial testimony that she embellished her story, and that there was never a knife involved. [R.T. 83, 95, 109].

b. The Propensity Evidence

i. Ms. Whitish

At some time during January, 1992, at 9:15 p.m., Michelle Whitish was walking to her friend's hotel room in the 4300 block of 70th street in San Diego, when a man she had

never seen before, later identified at trial as petitioner, jumped out of the bushes and held a knife to her side. [R.T. 129]

Petitioner forced Ms. Whitish into the cab of his truck and began to drive. He put her head into his lap, held the knife to her throat, and told her to orally copulate him. [R.T. 130-131] After Ms Whitish complied with petitioner's demand, he stopped driving, and threatened to hit her if she started crying. [R.T. 131-132]

Petitioner then obtained a gag from the back of his truck, handcuffed Ms. Whitish, and made her orally copulate him. Ms. Whitish asked petitioner to wear a condom, [R.T. 136] and afterwards told him where she lived in order for him to drop her off. [R.T. 141]. Due to outstanding warrants, she did not immediately report the incident, and petitioner was never charged. [R.T. 2]

ii Ms. Hughes

In May, 1992, at about 10:30 p.m., Cynthia Ann Hughes, while high on heroin, was working as a prostitute on

El Cajon Boulevard in San Diego. [R.T. 148, 159] Petitioner, driving a red pickup truck with a camper shell, slowed to a stop near her. [R.T. 148-150,159]. They eventually agreed upon a price for her services, and drove to a mutually agreed upon location. [R.T. 148-150]

Ms. Hughes took off her clothes, while petitioner (fully clothed) climbed on top of her and reached into a bag pulling out a knife. [R.T. 153-154]. He held the knife to her throat and waved it back and fourth around her face. Id.

Ms. Hughes said, "My God, don't kill me. Don't hurt me, you know. This was not part of the agreement." [R.T. 154]. Petitioner replied, "Shut up, don't scream, don't say a word and I won't hurt you. Just shut up." [R.T. 154]. After about five to ten minutes he let her up [R.T. 155], and told her to roll over to her stomach. She refused, he demanded his money back, and she complied. [R.T. 156]. They never had sex. [R.T. 156-159]. Petitioner was convicted of assault with a deadly weapon in violation of California Penal Code

§245(a)(1). [R.T. 3].

The State relied heavily on the testimony of Ms. Whitish and Ms. Hughes to counter Ms. Holman's testimony. The proffered basis for admissibility was that if Ms. Whitish and Ms. Hughes did not consent to petitioner's conduct, Ms. Holman did not consent either. [R.T. 261-262].

Reasons for Granting the Writ

The introduction of petitioner's uncharged prior sexual acts was improper because they lacked sufficient similarity to be probative. This Court should remand this case to the United States Court of Appeals for the Ninth Circuit for issuance of a certificate of appealability because reasonable jurists can debate (1) whether the prior sexual acts were similar in this case, and (2) what factors courts should look to when determining similarities.

This Court has recently set forth the standard for evaluating whether a certificate of appealability should issue to a habeas petitioner in order to permit his appeal to go forward pursuant to the provisions of 28 USC § 2253(c)(2). Slack v. McDaniel, 529 U.S. __, 120 S.Ct, 1595 (2000).

"Where a district court has rejected constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 120 S.Ct. at 1604.

State and Federal courts have overwhelmingly found that in order to be admissible, uncharged allegations of prior sexual conduct must be similar to the charged crimes. United States v. Delmerle, 99 F.3d 80, 85 (2nd Cir., 1999); United States v. Gabe, 237 F.3d 954, 959 (8th Cir., 2001); Doe v. Rudy-Glanzer, 232 F.3d 1258, 1268 (9th Cir., 2000); United States v. Meacham, 115 F.3d 1488, 1494 (10th Cir., 1997); Commonwealth v. English, 993 S.W. 2d 941, 945 (Ky., 1999); State v. Hammer, 613 N.W. 2d 629, 634-635 (Wis. 2000); State v. Howell, 557 N.W. 2d 908, 912 (Iowa At. App. 1996). The California Supreme Court, however, has approved the admission of evidence of prior sexual misconduct without

a showing of similarity in a sex prosecution. People v. Falsetta, 21 Cal. 4th 903, 911 (1999).

Some factors are of greater importance when determining whether the alleged incidents of prior misconduct lack similarity, and thus the risk of prejudice outweighs the probative value of the evidence. Doe v. Rudy-Glanzer, 232 F.3d at 1269. In that case, the plaintiff sought to introduce evidence of the defendant's alleged sexual assault upon his 12-year-old niece at a family party during a civil trial for allegedly molesting his 3-year-old daughter. The district court reasoned that while the incidents had certain similarities, as both incidents involved minor girls related to the defendant, there were several important differences. The location of the assaults was different, one occurring in public at a family party and the other in private. The assault on the grandchild also allegedly involved the use of a weapon, unlike the assault upon the niece, and the age of the victims was significantly different. The Ninth Circuit endorsed this view. Id. at 1270.

In the present case, the attack on Ms. Whitish differed from the incident with Ms. Holman in similar significant ways. The locations differed in that Ms. Whitish was attacked in the relative "privacy" of a truck [R.T. 129], whereas petitioner and Ms. Holman had sex at his apartment with his roommate present. [R.T. 205 -208] Location is very important in establishing a common plan or theme. DeVonish v. State, 500 S.W. 2d 800,801 (Tex. Crim. App. 1973). Additionally, Ms. Whitish's attacker used a knife. [R.T. 130-131]. Ms. Holman did make statements to Det. Bristol concerning a knife. [R.T. 139-173] Yet, she denied that petitioner used a knife during her trial testimony. [R.T. 83, 95, 109]. Finally, Mr. Ermert and Ms. Holman were involved in an ongoing relationship [R.T. 45-47] unlike Ms. Whitish who had never seen her attacker before the night of the attack. [R.T. 129]. Thus, the introduction of this evidence shed no light upon the only contested issue in the case, consent, but was extremely prejudicial.

Under these circumstances, a certificate of appealability should issue because reasonable jurists would, at least, find it debatable whether the introduction of this evidence deprived petitioner of his fundamental right to a fair trial as guaranteed by the due process clause.

Petitioner's assault with a deadly weapon conviction was improperly admitted because the conviction did not involve sex. This Court should remand this case to the United States Court of Appeals for the Ninth Circuit for issuance of a certificate of appealability because reasonable jurists can debate whether (1) the introduction of a non-sexual conviction was proper in this case and, (2) the assault upon Ms. Hughes was similar enough to be constitutionally admissible.

Rules regarding the introduction of evidence in cases involving sexual crimes cannot be used to allow the introduction of nonsexual crimes. State v. Jackson, 689 P. 2d 76, 79 (Wash., 1984); Dupree v. State, 543 So. 2d 125, 128 (Fla. App. District 1 1994).

In State v. Jackson, the Supreme Court of Washington found that the trial court improperly admitted into

evidence an assault involving a minor girl during the defendant's trial involving an attack on two girls. The previous incident merely established simple assault, not sexual contact. Thus, the Court held that the evidence was improperly admitted, but found the error to be harmless under the circumstances of that case. Id. at 79-80.

Here, petitioner and Ms. Hughes (a prostitute) made an agreement regarding sex. [R.T. 148-150] and proceeded to a secluded location, where the victim undressed. [R.T. 150-152]. Petitioner pulled out a knife, held the victim down, and told her to shut up. [R.T. 154]. He then commanded Ms. Hughes to roll over on her stomach, and when she refused he asked for his money back and she left. [R.T. 156-159]. For this incident, petitioner was convicted of assault with a deadly weapon.

This conviction was not one involving sex, and therefore should not have been admitted under the authority set forth above. See also, State v. Halstein, 857 P.2d 270

(Wash., 1993) discussing R.C.W .(Revised Code of Washington) 13.40.135; State v. Patterson, 963 P.2d 436 (Kan. App. 1998) discussing K.S.A. (Kansas Statutes Annotated) 22-4902(b)(12). The contrary holding in petitioner's case was plainly wrong.

Apart from this error, the evidence of this assault was also improperly admitted, as it lacked sufficient similarity to the charged offenses to be probative. Doe v. Rudy-Glanzer, supra at 1269. Important differences existed between the uncharged allegations and the conduct charged. The assault with a deadly weapon upon Ms. Hughes occurred in relative privacy, [R.T. 150-152] and by definition involved the use of a weapon. There was no previous relationship between Ms. Hughes and the defendant. For these reasons, this evidence had no relevance to the disputed issue of consent. It served only to establish that petitioner was an unsavory individual in violation of his right to an unbiased assessment of his guilt of the charged offenses as guaranteed by due process. Because

reasonable jurists would, at least, find it debatable whether this state of affairs rendered petitioner's convictions constitutionally infirm, a certificate of appealability should issue.

The Evidence adduced at Petitioner's trial was insufficient as a matter of Law to Sustain his convictions.

A. The evidence presented was insufficient as a matter of law.

The standard for assessing the legal sufficiency of the evidence is, "Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). The testimony at trial revealed a conflict, not between petitioner and Ms. Holman, but between Ms. Holman's trial testimony and Ms. Holman's statements to Detective Bristol during a police interview in which Ms. Holman admittedly exaggerated to the police [R.T. 83, 95, 109] after being forced

to report her encounter with petitioner to the police by her boyfriend. [R.T. 73-74] The key conflicts in the two versions related to the use of a knife, petitioner's demand for oral copulation, and, most importantly, whether petitioner's conduct was consensual.

Ms. Holman offered reasonable explanations as to why she changed her account of the night in question. She testified that she was afraid of her boyfriend and what he would do if he knew the sex was consensual. [R.T. 93-94, 220]. Accordingly, she told him she didn't resist in order to protect herself. [R.T. 113] The only occasions where Ms. Holman accused petitioner of the crimes charged were in her boyfriend's presence [R.T. 73-75, 108] and with the police and her boyfriend present. [R.T. 163] Viewing the evidence in the light most favorable to the prosecution, the statements made to police by Ms. Holman were undercut to such a degree that they are not sufficient under the Jackson standard to support petitioner's convictions.

B. While petitioner vigorously maintains that evidence of the other sexual assaults was improperly admitted, the evidence was insufficient as a matter of law even if this evidence is considered.

The use of propensity evidence cannot alone meet the prosecution's burden of proof beyond a reasonable doubt . United States v. McHorse, 179 F.3d 889, 897 (10th Cir. 1999); People v. James, 81 Cal. App. 4th 1343, 1353 (2000); Estelle v. McGuire, 502 U.S. 62, 78 (1991) (Justice O'Connor, with whom Justice Stevens joined, concurring in part and dissenting in part, expressing concerns about the State reducing its burden of proof by the use of propensity evidence).

Here, petitioner's sexual preference to engage in domination and bondage [R.T. 55, 89, 97, 233-224] obviously confused the jury and prejudiced petitioner. The sex between petitioner and Ms. Holman was admittedly painful to her [R.T. 70, 89], but that factor did not render the conduct non-consensual. The danger is that the trier of fact mistook the

painful nature of the sexual acts as signifying a lack of consent. See, United States v. Guardia, 955 F.Supp. 115, 118 (D.N.M.).

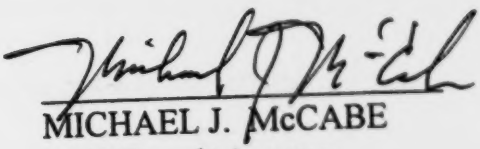
In any event, the admission of the other crimes evidence here did not render the otherwise insufficient evidence sufficient to satisfy the Jackson standard, requiring the issuance of a certificate of appealability on this issue as well.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits the petition for writ of certiorari should be granted.

Dated: August 3, 2001

Respectfully submitted,



MICHAEL J. McCABE
2442 Fourth Avenue
San Diego, CA 92101-1609
Telephone: (619) 231-1181
Attorney for Petitioner
DONALD STEPHEN ERMERT